

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

BRANDON GUEVARA-PONTIFES,

Case No. 3:20-cv-00652-ART-CSD

Petitioner,

ORDER

v.

RENEE BAKER, *et al.*,

Respondents.

I. SUMMARY

Petitioner Brandon Guevara-Pontifes filed a First Amended Petition for writ of habeas corpus under 28 U.S.C. § 2254 (ECF No. 18) (“petition”). Respondents moved to dismiss the petition, contending, among other things, that Grounds 2(A) and 2(C) are unexhausted. (ECF No 25 at 6–8.) Guevara-Pontifes, in turn, has filed a motion to stay the case while he returns to state court to exhaust Grounds 2(A) and 2(C). (ECF No. 44.) He also seeks a stay so he can present to the state courts additional evidence (ECF No. 19) that post-conviction counsel failed to present to the state courts when the claims in Grounds 2(B), 2(D), and 2(E), were exhausted in state postconviction proceedings. (*Id.*) Respondents oppose a stay on the grounds that ineffective assistance of post-conviction counsel does not support good cause for a stay, a stay is futile because the unexhausted claims are procedurally barred under Nevada law, and stay is futile as to the exhausted claims because this Court will be unable to consider the new evidence in assessing the exhausted claims upon return to this Court following a stay. (ECF No. 50.) As discussed below, the Court will grant the motion for stay.

II. BACKGROUND

In 2016, a jury found Guevara-Pontifes guilty of first-degree kidnapping, battery with intent to commit sexual assault, and sexual assault, in the Second

1 Judicial District Court for Washoe County, Nevada. (ECF No. 30-4.) The state
 2 district court sentenced Guevara-Pontifes to an aggregate sentence of 18 years to
 3 life imprisonment. (ECF No. 30-18.) Guevara-Pontifes appealed, and the Nevada
 4 Court of Appeals affirmed the judgment on May 4, 2017. (ECF No. 31-10.) In
 5 September 2020, the Nevada Supreme Court affirmed the denial of Guevara-
 6 Pontifes's initial post-conviction petition. (ECF No. 33-18.)

7 **III. APPLICABLE LEGAL PRINCIPLES**

8 **A. Exhaustion and Procedural Default**

9 Federal courts may not grant a writ of habeas corpus brought by a person
 10 in custody pursuant to a state court judgment unless "the applicant has
 11 exhausted the remedies available in the courts of the State." 28 U.S.C. §
 12 2254(b)(1)(A). The exhaustion requirement is "grounded in principles of comity"
 13 as it gives the States "the first opportunity to address and correct alleged
 14 violations of state prisoner's federal rights." *Coleman v. Thompson*, 501 U.S. 722,
 15 731 (1991). To exhaust a claim, a petitioner must fairly present the claim to the
 16 highest available state court and must give that court the opportunity to address
 17 and resolve it. *See Duncan v. Henry*, 513 U.S. 364, 365 (1995) (relying on *Picard*
 18 *v. Connor*, 404 U.S. 270, 275 (1971)).

19 "Submitting a new claim to the state's highest court in a procedural context
 20 in which its merits will not be considered absent special circumstances does not
 21 constitute fair presentation." *Roettgen v. Copeland*, 33 F.3d 36, 38 (9th Cir. 1994)
 22 (citing *Castille v. Peoples*, 489 U.S. 346, 351 (1989)). Thus, "[a]n unexhausted
 23 claim will be procedurally defaulted, if state procedural rules would now bar the
 24 petitioner from bringing the claim in state court." *Dickens v. Ryan*, 740 F.3d 1302,
 25 1317 (9th Cir. 2014). In *Coleman*, the Supreme Court held that a state prisoner
 26 who fails to comply with state-law procedural requirements in presenting his
 27 claims in state court is barred by the adequate and independent state ground
 28 doctrine from obtaining a writ of habeas corpus in federal court. *Coleman*, 501

1 U.S. at 731–32.

2 Where a procedural default constitutes an adequate and independent state
 3 ground for denial of habeas corpus, the default may be excused only if “a
 4 constitutional violation has probably resulted in the conviction of one who is
 5 actually innocent,” or if the prisoner demonstrates cause for the default and
 6 prejudice resulting from it. *Murray v. Carrier*, 477 U.S. 478, 496 (1986). To
 7 demonstrate cause, the petitioner must establish that “some objective factor
 8 external to the defense impeded counsel’s efforts to comply with the State’s
 9 procedural rule.” *Murray v. Carrier*, 477 U.S. 478, 488 (1986); *Hiivala v. Wood*,
 10 195 F.3d. 1098, 1105 (9th Cir. 1999). “[T]o establish prejudice, [a petitioner] must
 11 show not merely a substantial federal claim, such that ‘the errors . . . at trial
 12 created a possibility of prejudice,’ but rather that the constitutional violation
 13 ‘worked to his actual and substantial disadvantage.’” *Shinn v. Ramirez*, 142 S. Ct.
 14 1718, 1734–35 (2022) (citing *Carrier*, 477 U.S. at 494 and quoting *United States*
 15 *v. Frady*, 456 U.S. 152, 170 (1982)) (emphasis in original).

16 In *Martinez v. Ryan*, the Supreme Court ruled that ineffective assistance of
 17 post-conviction counsel may serve as cause with respect to a claim of ineffective
 18 assistance of trial counsel for purpose of overcoming the procedural default of a
 19 claim. The Court in *Martinez* stated:

20 Where, under state law, claims of ineffective assistance of trial
 21 counsel must be raised in an initial-review collateral proceeding, a
 22 procedural default will not bar a federal habeas court from hearing a
 23 substantial claim of ineffective assistance at trial if, in the initial-
 24 review collateral proceeding, there was no counsel or counsel in that
 25 proceeding was ineffective.

26 566 U.S. 1, 17 (2012); *see also Trevino v. Thaler*, 569 U.S. 413, 423 (2013).

27 **B. Stay and Abeyance**

28 A district court is authorized to stay an unexhausted petition in “limited
 29 circumstances,” to allow a petitioner to present unexhausted claims to the state
 30 court without losing the right to federal habeas review due to the relevant one-

1 year statute of limitations. *Rhines v. Weber*, 544 U.S. 269, 273–77 (2005); *Mena*
 2 *v. Long*, 813 F.3d 907, 912 (9th Cir. 2016) (holding that district courts have
 3 authority to stay and hold in abeyance both mixed petitions and “fully
 4 unexhausted petitions under the circumstances set forth in *Rhines*”).

5 Under the *Rhines* test, “a district court must stay a mixed petition only if:
 6 (1) the petitioner has ‘good cause’ for his failure to exhaust his claims in state
 7 court; (2) the unexhausted claims are potentially meritorious; and (3) there is no
 8 indication that the petitioner intentionally engaged in dilatory litigation tactics.”
 9 *Wooten v. Kirkland*, 540 F.3d 1019, 1023 (9th Cir. 2008) (citing *Rhines*, 544 U.S.
 10 at 278). The Ninth Circuit has acknowledged that the *Rhines* “good cause”
 11 standard does not require “extraordinary circumstances.” *Id.* at 1024 (citing
 12 *Jackson v. Roe*, 425 F.3d 654, 661–62 (9th Cir. 2005)). However, courts “must
 13 interpret whether a petitioner has ‘good cause’ for a failure to exhaust in light of
 14 the Supreme Court’s instruction in *Rhines* that the district court should only stay
 15 mixed petitions in ‘limited circumstances.’” *Id.* (citing *Jackson*, 425 F.3d at 661).
 16 Courts must also “be mindful that AEDPA aims to encourage the finality of
 17 sentences and to encourage petitioners to exhaust their claims in state court
 18 before filing in federal court.” *Id.* (citing *Rhines*, 544 U.S. at 276–77).

19 “This Court has declined to prescribe the strictest possible standard for
 20 issuance of a stay.” *E.g., Riner v. Crawford*, 415 F. Supp. 2d 1207, 1210 (D. Nev.
 21 2006). “[G]ood cause under *Rhines*, at least in this Circuit, should not be so strict
 22 a standard as to require a showing of some extreme and unusual event beyond
 23 the control of the defendant.” *Id.* The Ninth Circuit has held that the ineffective
 24 assistance of post-conviction counsel can constitute good cause to obtain a stay
 25 for purposes of exhausting a claim in state court. *Blake v. Baker*, 745 F.3d 977,
 26 982–83 (9th Cir. 2014). However, “[g]ood cause requires more than just a ‘bald
 27 assertion[;]’ rather, it “turns on whether the petitioner can set forth a reasonable
 28 excuse, supported by sufficient evidence, to justify [the failure to exhaust].” *Id.*

1 “[G]ood cause under *Rhines*, when based on [ineffective assistance of counsel],
 2 cannot be any more demanding than a showing of cause under *Martinez* to
 3 excuse state procedural default.” *Dixon v. Baker*, 847 F.3d 714, 721, (9th Cir.
 4 2017) (finding lack of postconviction counsel sufficient good cause for a stay).

5 The Ninth Circuit has recently ruled that a district court is required to
 6 consider whether post-conviction counsel’s alleged ineffectiveness provided a
 7 reasonable excuse, supported by sufficient evidence, to justify petitioner’s failure
 8 to exhaust claims. *Bolin v. Baker*, 994 F.3d 1154 (9th Cir. 2021).

9 **IV. DISCUSSION**

10 Ground 2 of the petition alleges claims of ineffective assistance of trial
 11 counsel. (ECF No. 18 at 17–33.) Guevara-Pontifes admits that he failed to exhaust
 12 Ground 2(A) (failure to object to erroneous jury instructions on kidnapping) and
 13 Ground 2(C) (failure to object to the victim’s translation of her text and telephone
 14 conversations with Guevara-Pontifes). (*Id.*)

15 The Court finds Guevara-Pontifes has established good cause for his failure
 16 to exhaust Ground 2(A). Ground 2(A) alleges trial counsel was ineffective in failing
 17 to object to a jury instruction on kidnapping and request an instruction on the
 18 requirements for kidnapping incident to sexual assault. (ECF No. 18 at 18–19.)
 19 Guevara-Pontifes alleges there is good cause for a stay because his post-
 20 conviction counsel was ineffective in failing to raise that claim. (ECF No. 44 at 4–
 21 6.) Respondents do not oppose that contention. (ECF No. 50.) Guevara-Pontifes’s
 22 showing of good cause is not “a bare allegation” of state post-conviction ineffective
 23 assistance; rather, it is a reasonable excuse for failing to exhaust the claim and
 24 the existing state court record demonstrates that postconviction counsel did not
 25 raise the claim. *Blake*, 745 F.3d at 983.

26 Guevara-Pontifes has also established that Ground 2(A) is not plainly
 27 meritless. *Dixon*, 847 F.3d at 722 (Petitioner must show at least one of his
 28 unexhausted claims is not “plainly meritless.”). “In determining whether a claim

1 is ‘plainly meritless,’ principles of comity and federalism demand that the federal
 2 court refrain from ruling on the merits of the claim unless ‘it is perfectly clear
 3 that the petitioner has no hope of prevailing.’” *Id.* (quoting *Cassett v. Stewart*, 406
 4 F.3d 614, 624 (9th Cir. 2005)). In the absence of any contention to the contrary
 5 by Respondents, the Court cannot say whether or not “it is perfectly clear that
 6 [Guevara-Pontifex] has no hope of prevailing” on the merits of Ground 2(A).
 7 Moreover, it appears that the resolution of the claim requires a fact-based
 8 determination based on the record of the trial evidence.

9 There is also no indication Guevara-Pontifex has “intentionally engaged in
 10 dilatory litigation tactics.” *Wooten*, 540 F.3d at 1023 (citing *Rhines*, 544 U.S. at
 11 278); *see also Rosales v. Byrne*, No. 16-cv-00003, 2019 WL 1177967, at *3 (D.
 12 Nev. Mar. 11, 2019) (“While it perhaps is not inconceivable that a noncapital
 13 habeas petitioner might engage in intentionally dilatory tactics, the relevance of
 14 this factor, as a practical matter, largely is restricted to capital cases.”).

15 Respondents concede that a petitioner may rely upon the ineffective
 16 assistance of post-conviction counsel as good cause for a stay. (ECF No. 50 at 3).
 17 Respondents contend the recent Supreme Court opinions in *Ramirez* and *Shoop*
 18 *v. Twyford*, 142 S. Ct. 2037, 2045–46 (2022), “undermine without overruling the
 19 principle in *Blake* that ineffective assistance of post-conviction counsel can serve
 20 as cause to support a *Rhines* stay.” (*Id.* at n.1).

21 In *Ramirez*, the Supreme Court held that in adjudicating a *Martinez* claim
 22 for purposes of overcoming the procedural default of a habeas claim, “a federal
 23 habeas court may not conduct an evidentiary hearing or otherwise consider
 24 evidence beyond the state-court record based on ineffective assistance of state
 25 post-conviction counsel” unless the petitioner satisfies the stringent
 26 requirements of 28 U.S.C. § 2254(e)(2). 142 S. Ct. 1718, 1734 (2022). “[B]ecause
 27 there is no constitutional right to counsel in state post-conviction proceedings . . .
 28 . a prisoner ordinarily must ‘bear’ responsibility’ for all attorney errors during

1 those proceedings . . . ” *Id.* (quoting *Williams v. Taylor*, 529 U.S. 420, 432 (2000))
 2 (internal citations omitted). “Among those errors,” the Court explained, “a state
 3 prisoner is responsible for counsel’s negligent failure to develop the state post-
 4 conviction record.” *Id.* In such cases, a federal court may order an evidentiary
 5 hearing or otherwise expand the state-court record *only if* the prisoner can satisfy
 6 the requirements of § 2254(e)(2). *Id.* (emphasis added.)

7 In *Shoop*, the Supreme Court held that a federal transportation order was
 8 not “necessary or appropriate in aid of” the District Court’s jurisdiction under the
 9 All Writs Act where the petitioner failed to show that the evidence that he hoped
 10 to find would be useful or admissible in the federal habeas case. 142 S. Ct. at
 11 2042–43, 2045 (“[A] writ seeking new evidence would not be ‘necessary or
 12 appropriate in aid of’ a federal habeas court’s jurisdiction, as all orders issued
 13 under the All Writs Act must be, if it enables a prisoner to fish for unusual
 14 evidence, in the hope that it might undermine his conviction in some way.”).

15 Based on *Ramirez* and *Shoop*, Respondents may be correct in their
 16 assertion that Guevara-Pontifes is unable to rely upon postconviction counsel’s
 17 ineffective assistance in failing to develop the state court record for purposes of
 18 establishing good cause for a stay to return to state court to present additional
 19 documents to support his exhausted claims in Grounds 2(B), 2(D), and 2(E).¹
 20 (ECF No. 44 at 2.) The Court, however, need not reach a determination whether
 21 Guevara-Pontifes may or may not, return to state court to present new evidence
 22 in support of his claims or whether this Court will entertain such new evidence
 23 upon return to this Court following the stay. Neither *Ramirez* nor *Shoop* concern
 24 the good cause requirements for a *Rhines* stay nor do they foreclose a petitioner

25
 26 ¹ In the petition, Guevara-Pontifes asserts that he exhausted Ground 2(B) (failure
 27 to object to the State expert’s testimony), Ground 2(D) (failure to object to the
 28 motion to suppress Guevara-Pontifes’s statement to police), and Ground 2(E)
 (failure to object to prosecutorial misconduct) in his state post-conviction
 proceedings. (ECF No. 18 at 17–33.)

1 from demonstrating good cause for a stay based on post-conviction counsel's
 2 failure to raise an unexhausted claim in state court. As discussed, Guevara-
 3 Pontifes has met the good cause standard for a stay for purposes of returning to
 4 state court to pursue at least one of his unexhausted claims. Therefore, the Court
 5 does not consider whether Guevara-Pontifes meets the *Rhines* standard for a stay
 6 as to the other claims that he wishes to pursue in state court during a stay. See
 7 *Archanian v. Gittere*, No. 19-cv-00177, 2019 WL 6499113, at *2 (D. Nev. Dec. 3,
 8 2019). ("If a [Rhines] stay is warranted with respect to any single claim, the court
 9 need not conduct a claim-by-claim analysis regarding the remaining claims.").

10 Respondents contend that a stay for purposes of returning to state court is
 11 an exercise in futility and a waste of state judicial resources as several procedural
 12 bars will prohibit review of the merits of the unexhausted claims. (ECF No. 50 at
 13 4, n.2); *see also* Nev. Rev. Stat. §§ 34.726(1), 34.810(1)(b)(2). As such,
 14 Respondents contend a stay will not provide the state courts with a fair
 15 opportunity to consider the merits of the unexhausted claims. (*Id.*).

16 Guevara-Pontifes admits that his only basis for cause to overcome a
 17 procedural default of his unexhausted claims is his reliance upon ineffective
 18 assistance of trial and post-conviction counsel under *Martinez*. Although *Martinez*
 19 presents a path to overcome a procedural default in federal courts, the Nevada
 20 Supreme Court has expressly declined to follow the *Martinez* exception to excuse
 21 state procedural bars. *See Brown v. McDaniel*, 130 Nev. 565, 569–76 (2014).
 22 Thus, Grounds 2(A) and 2(C) are concededly technically exhausted and
 23 procedurally defaulted and it would appear futile to return to state court to
 24 exhaust them. Aside from *Martinez*, Nevada's cause-and-prejudice standards are
 25 substantially similar to federal standards such that nearly any argument a
 26 petitioner might present in federal court to overcome a procedural default can be
 27 presented to the state courts in the first instance. Guevara-Pontifes, however,
 28 asserts that if the stay is granted, he can argue to the Nevada Supreme Court,

1 that in light of the Supreme Court's decision in *Ramirez*, it should overrule *Brown*
2 and permit the use of the principles set forth in *Martinez* for purposes of
3 overcoming state procedural bars. (ECF No. 52 at 4–5.)

4 Although the Court agrees that Guevara-Pontifes's return to state court is
5 unlikely to result in a determination of the merits of his claims due to the state
6 procedural bars, Guevara-Pontifes has met the requirements for a stay as to at
7 least one of his unexhausted claims in accordance with *Rhines*, *Blake*, and *Bolin*.
8 Accordingly, the motion for stay will be granted.

9 **IT IS THEREFORE ORDERED** that Guevara-Pontifes's Motion for a Stay
10 and Abeyance (**ECF No. 44**) is **GRANTED**.

11 **IT IS FURTHER ORDERED** that this action is stayed pending exhaustion
12 of the unexhausted grounds in the First Amended Petition.

13 **IT IS FURTHER ORDERED** that the grant of a stay is conditioned upon
14 Guevara-Pontifes litigating his state post-conviction petition or other appropriate
15 proceeding in state court and returning to federal court with a motion to reopen
16 this action within 45 days of issuance of the remittitur by the Supreme Court of
17 Nevada at the conclusion of the state court proceedings.

18 **IT IS FURTHER ORDERED** that Respondents' Motion to Dismiss (**ECF No.**
19 **25**) is **DENIED WITHOUT PREJUDICE** to the reassertion of any and all defenses
20 then applicable following the stay.

21 **IT IS FURTHER ORDERED** that the Clerk of Court shall administratively
22 close this action, until such time as the Court grants a motion to reopen the
23 matter.

24 DATED THIS 23rd day of September 2022.

25 
26

27 ANNE R. TRAUM
28 UNITED STATES DISTRICT JUDGE